IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DARLYNE CASHMAN, for herself and as Personal Representative of the Estate of ROBERT CASHMAN, Deceased, Appellant, v. PACIFIC SCIENTIFIC COMPANY, Respondent.	)	NO. 61913-6-I DIVISION ONE Unpublished Opinion FILED: August 24, 2009

Lau, J. —Darlyne Cashman, individually and as the personal representative of the estate of Robert Cashman, claimed that while working on furnaces and generators manufactured by Pacific Scientific Company, Robert Cashman was exposed to asbestos-containing firebrick, block, gaskets, and packing insulation; Pacific failed to warn him about asbestos exposure health hazards; and he died of mesothelioma as a result. But the trial court dismissed the claims on summary judgment, finding that the estate failed to present sufficient admissible evidence that Cashman was exposed to an asbestos-containing product manufactured by Pacific. On cross-appeal, Pacific also

argues that the trial court erred in denying its motion to dismiss as a sanction for spoliation of evidence after Cashman's body was cremated without an autopsy. Because (1) the trial court properly concluded that the estate did not present sufficient evidence to raise a genuine issue of material fact on whether Cashman was exposed to asbestos from the particular Pacific products that he worked on and (2) the Supreme Court recently held in Simonetta v. Viad Corp., 165 Wn.2d 341, 197 P.3d 127 (2008) and Braaten v. Saberhagen Holdings, 165 Wn.2d 373, 198 P.3d 493 (2008) that a manufacturer owes no common law duty to warn users about the hazards of replacement asbestos insulation it did not manufacture, we affirm.

FACTS

From approximately 1967 until 1975, Robert Cashman worked at Puget Sound Heat Treating (PSHT) in Tacoma as a heat-treating helper and later as a shop foreman. And he also worked as a heat treater at the Naval Underseas Warfare Center in Keyport from approximately 1975 until he retired in 1997. His job duties included repairing and maintaining the heat-treating furnaces and endothermic gas generators.

In May 2005, Cashman was diagnosed with mesothelioma, a fatal cancer occurring in the lining of the lung that is frequently associated with asbestos exposure. In August 2005, the estate filed suit against numerous defendants, including Pacific. The estate alleged that Pacific manufactured and sold asbestos-containing furnaces and generators, Pacific failed to warn Cashman of the dangers of asbestos exposure, and he contracted mesothelioma as a result. He died on November 20, 2005.

Cashman's videotaped perpetuation deposition was taken on September 30, 2005. Before his death, defense counsel

notified the estate's attorneys that they reserved the right to have a defense pathologist observe the autopsy and to preserve all lung and pleural tissue samples pursuant to a 1984 "consolidated pretrial style order."[1] They later learned, however, that Cashman had been cremated without an autopsy. Consequently, on August 10, 2006, Pacific and other defendants moved to dismiss the lawsuit, arguing spoliation of material causation evidence. The trial court denied the motion after concluding defendants failed to establish spoliation occurred. Defendants then sought, but we denied, discretionary review. The defendants renewed their motion to dismiss the lawsuit as an appropriate sanction for spoliation. Rather than dismiss, the trial court ordered a lesser sanction.

Meanwhile, on August 31, 2007, Pacific moved for summary judgment dismissal. It argued the estate lacked sufficient admissible evidence to demonstrate that the particular Pacific equipment Cashman worked on had been manufactured with asbestos.[2] In response, the estate pointed to Cashman's deposition, his expert's testimony, and documents obtained in discovery to show that Pacific manufactured asbestos-containing furnaces and generators. The estate also argued that Pacific owed a duty to warn Cashman about asbestos-containing materials manufactured by

[1] The style order, which applies to asbestos lawsuits litigated in King County, provides that "autopsies should be conducted for each plaintiff who expires for any reason during the pendency of this litigation, subject to religious or ethical considerations personal to that plaintiff or the immediate family."

[2] The record shows that Pacific was founded in 1919 as a precision instrument company. Eventually it began manufacturing furnaces and generators. Pacific sold its furnace division to the Selas Corporation in 1977. It is undisputed that Pacific never manufactured asbestos insulation.

other companies that were later installed as replacement insulation on Pacific's products.

On November 27, 2007, the trial court granted Pacific's motion for summary judgment dismissal, concluding that the estate failed to produce sufficient evidence to raise a genuine issue of material fact that Cashman had been exposed to respirable asbestos fibers from a product manufactured or sold by Pacific. The estate appealed.

ANALYSIS

Summary Judgment

The estate argues the trial court erred in granting Pacific's motion for summary judgment because the evidence and reasonable inferences raise material issues of fact on whether the two Pacific furnaces and the generator Cashman worked on contained asbestos insulation. Appellate courts review summary judgment orders de novo, engaging in the same inquiry as the trial court. Seattle Police Officers Guild v. City of Seattle, 151 Wn.2d 823, 830, 92 P.3d 243 (2004). Summary judgment is proper if there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. Seattle Police, 151 Wn.2d 830; CR 56(c). "A material fact is one upon which the outcome of the litigation depends." Kim v. O'Sullivan, 133 Wn. App. 557, 559, 137 P.3d 61 (2006). When determining whether an issue of material fact exists, we construe all reasonable inferences in favor of the nonmoving party. Ranger Ins. Co. v. Pierce County, 164 Wn.2d 545, 552, 192 P.3d 886 (2008). "We do not weigh the evidence or determine the truth of the matter; the only question is whether there is a genuine issue for trial." Arreygue v. Lutz, 116 Wn. App. 938, 940–41, 69

P.3d 881 (2003).

A defendant moving for summary judgment may meet the initial burden by pointing out the absence of evidence to support the nonmoving party's case. Young v. Key Pharm., Inc., 112 Wn.2d 216, 225 n.1, 770 P.2d 182 (1989). "If the moving party is a defendant and meets this initial showing, then the inquiry shifts to the party with the burden of proof at trial, the plaintiff." Young, 112 Wn.2d at 225 (footnote omitted). The facts set forth must be specific, detailed, and not speculative or conclusory. Sanders v. Woods, 121 Wn. App. 593, 600, 89 P.3d 312 (2004). If, at this point, the plaintiff "'fails to make a showing sufficient to establish the existence of an element essential to [her] case, and on which [she] will bear the burden of proof at trial,'" the trial court should grant the motion. Young, 112 Wn.2d at 225 (quoting Celotex Corp. v. Catrett, 477 U.S. 317, 322, 106 S. Ct. 2548, 91 L. Ed. 2d 265 (1986)).

To recover on its claims against Pacific, the estate must prove Pacific sold a product that was not reasonably safe as designed or that lacked adequate warnings and the unsafe condition of the product was a proximate cause of Cashman's injury. 6 Washington Practice: Washington Pattern Jury Instructions: Civil 110.21, 110.21.01 at 621–22 (5th ed. 2005). Both product liability and negligence actions carry a proximate cause requirement that the plaintiff must establish by a preponderance of the evidence to prevail. RCW 7.72.030(1); Iwai v. State, 129 Wn.2d 84, 96, 915 P.2d 1089 (1996). "Generally, under traditional product liability theory, the plaintiff must establish a reasonable connection between the injury, the product causing the injury, and the manufacturer of that product." Lockwood v. AC & S, Inc., 109 Wn.2d 235, 245, 744 P.2d 605 (1987). But asbestos plaintiffs

in Washington may establish exposure to a defendant's product through direct or circumstantial evidence. Allen v. Asbestos Corp., Ltd., 138 Wn. App. 564, 571, 157 P.3d 406 (2007).

> Lockwood identified several factors a court must consider when evaluating whether sufficient evidence of causation exists: (1) plaintiff's proximity to the asbestos product when the exposure occurred and the expanse of the work site where asbestos fibers were released; (2) the extent of time the plaintiff was exposed to the product and (3) the types of asbestos products to which plaintiff was exposed and the ways in which the products were handled and used.

Berry v. Crown Cork & Seal Co., 103 Wn. App. 312, 323–24, 14 P.3d 789 (2000) (citing Lockwood, 109 Wn.2d at 248).

While this appeal was pending, the Supreme Court held that a manufacturer owes no common law duty to warn of the hazards of asbestos insulation that it did not manufacture, sell, or supply. Simonetta, 165 Wn.2d at 354; Braaten, 165 Wn.2d at 389–90. Absent a legal duty, Pacific is not liable for failure to warn Cashman about the hazards of replacement asbestos insulation made by third parties and installed on its equipment.[3] Accordingly, our review is limited to the question of whether the estate presented sufficient evidence to raise a question of material fact regarding whether Cashman was exposed to asbestos from insulation Pacific originally installed.

[3] The estate contends that there is a question of material fact regarding whether Pacific was in the chain of distribution for replacement insulation products. It points to Cashman's testimony that replacement parts for the generator "came through the Pacific Scientific maintenance company in Seattle." But this testimony was made in the context of discussing the generator's "mechanical inner workings," not insulation. The estate also notes that Cashman said Pacific supplied the replacement jack arches for the furnace at Keyport. But there is no evidence that the replacement jack arches contained asbestos. This evidence is insufficient to overcome summary judgment regarding Pacific's liability for replacement insulation.

The estate bases its claims against Pacific on Cashman's exposure to asbestos dust from two furnaces and one generator. Although Pacific acknowledges that its products were present at Cashman's workplace and that Cashman was exposed to insulation while working with those products, Pacific responds that the estate did not meet its burden to produce sufficient admissible evidence from which a jury could reasonably conclude that Cashman was exposed to a Pacific product that contained asbestos components when originally manufactured and sold.

Here, the estate contends that Cashman's perpetuation deposition testimony provided direct evidence that the furnaces and generator he worked on contained asbestos. Cashman testified that he worked on three Pacific products—a box furnace at PSHT, an endothermic gas generator at PSHT, and a box furnace at Keyport. He claimed that the furnaces were insulated with asbestos-containing firebrick, block insulation, door gaskets, and packing material. He also asserted that the generator at PSHT included asbestos block insulation. As part of his job duties, he repaired or replaced damaged insulation. This process generated dust, which he inhaled.

But Pacific responds that Cashman did not establish the necessary foundation that qualifies him to testify as an expert or lay witness about the presence of asbestos in the materials he encountered.[4] Pacific also notes that the estate did not designate Cashman as an expert witness until more than a year after his death. As a result, he

[4] On February 9, 2007, the estate designated him as an expert witness regarding the asbestos content of the Pacific products he worked on "based upon his training, experience, and knowledge."

never prepared a report, signed a declaration, or submitted to an expert deposition.[5]

The admissibility of expert testimony in Washington is governed by ER 702, which provides, "If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise." "[ER 702] involves a two-step inquiry—whether the witness qualifies as an expert and whether the expert testimony would be helpful to the trier of fact." Reese v. Stroh, 128 Wn.2d 300, 306, 907 P.2d 282 (1995). In the appropriate context, practical experience is sufficient to qualify a witness as an expert. State v. McPherson, 111 Wn. App 747, 762, 46 P.3d 284 (2002).

And the admissibility of lay opinion testimony is governed by ER 701, which provides,

> If the witness is not testifying as an expert, the witness' testimony in the form of opinions or inferences is limited to those opinions or inferences which are (a) rationally based on the perception of the witness, (b) helpful to a clear understanding of the witness' testimony or the determination of a fact in issue, and (c) not based on scientific, technical, or other specialized knowledge within the scope of rule 702.

"A lay witness may testify as to his or her opinion under circumstances of personal knowledge based upon rational perceptions when it would help the jury understand the witnesses' testimony or a fact in issue." Pagnotta v. Beall Trailers of Oregon, Inc., 99 Wn. App. 28, 34, 991 P.2d 728 (2000). In addition, ER 602 states the well-established

[5] Pacific does not argue, explain, or cite authority regarding the legal significance of Cashman's untimely designation as an expert. "Passing treatment of an issue or lack of reasoned argument is insufficient to merit judicial consideration." Palmer v. Jensen, 81 Wn. App. 148, 153, 913 P.2d 413 (1996).

rule that a witness must testify on the basis of facts or events that the witness has personally observed.

> A witness may not testify to a matter unless evidence is introduced sufficient to support a finding that the witness has personal knowledge of the matter. Evidence to prove personal knowledge may, but need not, consist of the witness' own testimony. This rule is subject to the provisions of rule 703, relating to opinion testimony by expert witnesses.

We agree that Cashman did not establish the necessary foundation to testify as an expert or a lay witness on whether the insulation materials he encountered when repairing the furnaces and generator contained asbestos. Our review of the record shows there is nothing in his deposition testimony or in any other document demonstrating that he possessed the skill, education, training, or experience to qualify as an ER 702 expert on asbestos identification. Similarly, there is nothing in the record to establish that his lay asbestos identification opinion was rationally based on his perception, as required by ER 602 and 701. As explained below, there is a reasonable inference from the evidence in the record that some furnace insulation materials were formulated with asbestos and some were not.

Furthermore, Cashman did not present evidence on how he can distinguish asbestos-laden insulation from asbestos-free alternatives. He did not state that he had done anything to determine the asbestos content of the materials, explain how his experience working as a heat treater might serve as a basis for his opinion, assert he had any special expertise or equipment to perform asbestos testing, or testify that the asbestos-laden insulation was labeled as such or was otherwise visually distinguishable. He simply opined that he assumed, believed, or was told that the materials contained asbestos.[6] In State v.

Smith, 87 Wn. App. 345, 352, 941 P.2d 725 (1997), a prosecution for speeding, we reasoned that a highway patrol officer should not have been allowed to testify that the aerial surveillance traffic marks (ASTMs) painted on the highway were "'accurately measured off[] or otherwise designated or determined,'" because the arresting officer had simply assumed ASTMs were accurately measured without any personal knowledge of that fact. Smith, 87 Wn. App. at 352 (quoting RCW 46.61.470(2)). And ER 602 expressly bars testimony that purports to relate facts but is based only on the reports of others.[7] While Cashman's testimony that Pacific's furnaces and generator were present in the workplace and he was exposed to dust when repairing them is admissible, Cashman's opinion identifying the materials as asbestos is not.

The estate also asserts that there is no authority that a worker must be qualified as an expert to testify whether a product he worked with contained asbestos.[8] But that is not the issue. Rather, the question is whether the record shows an adequate evidentiary foundation for Cashman's opinion as either an expert or lay witness.

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[6] Cashman testified that an industrial hygienist at Keyport told him that the packing material around the furnace heating elements contained asbestos. The estate argues that this statement is admissible as a hearsay exception under ER 801(d)(2) because the industrial hygienist was Pacific's agent. But there is nothing in the record to support that assertion.

[7] The rule makes one exception to allow an expert witness to express an opinion based upon the reports of others but subject to the provisions of ER 703.

[8] We note that the estate did not argue below that Cashman's testimony regarding asbestos content was admissible as lay opinion testimony under ER 701. "Generally, failure to raise an issue before the trial court precludes a party from raising it on appeal." Lunsford v. Saberhagen Holdings, Inc., 139 Wn. App. 334, 338, 160 P.3d 1089 (2007), aff'd, 166 Wn.2d 264, 208 P.3d 1092 (2009).

Indeed, courts have upheld verdicts for asbestos plaintiffs based on the personal testimony of workers, but they do not allow witnesses to testify that a substance contained asbestos without a proper foundation for the opinion.[9] And no expert opinion is admissible unless the witness has first been qualified by a showing that he has sufficient expertise to state a helpful and meaningful opinion. Sehlin v. Chi., Milwaukee, St. Paul & Pac. R.R. Co., 38 Wn. App. 125, 132-33, 686 P.2d 492 (1984).

We turn to the remaining evidence. The estate contends that circumstantial evidence raises a reasonable inference that Cashman was exposed to asbestos from block insulation, door gaskets, and packing material originally installed in the Pacific furnaces and generator he worked on.[10]

The estate relies on industrial hygienist Steven Paskal's testimony that asbestos was presumptively a part of furnace insulation during the 1960s and 1970s. He

[9] See, e.g., Gibson v. Workers' Comp. Appeal Bd., 580 Pa. 470, 485 n.8, 861 A.2d 938 (2004) (witness was competent to testify to dusty condition of workplace and presence of cottony material on pipes and floor, but not whether that material contained asbestos, where his opinion was based on "what people said" rather than personal knowledge); Goldman v. Johns-Manville Sales Corp., 33 Ohio St. 3d 40, 41–44, 514 N.E.2d 691 (1987) (excluding lay testimony of witnesses who "believed" and "were told" that asbestos was present in a bakery because they were not based on personal knowledge); Shesler v. Consol. Rail Corp., 151 Ohio App. 3d 462, 469, 784 N.E.2d 725 (2003) (witness established foundation to testify to presence of asbestos in workplace where he saw bags and bills of lading labeled "asbestos" and testified that he was intimately familiar with the product's use); Perman v. C.H. Murphy/Clark-Ullman, Inc., 220 Or. App. 132, 139, 185 P.3d 519 (2008) (witness's testimony clearly established that his opinion regarding asbestos content of gloves was rationally based on his perception).

[10] Although Cashman testified that he also worked with firebrick insulation, the estate's briefs contain no argument about firebrick. And the record contains evidence that firebrick typically did not contain asbestos.

testified, "My experience and the general understanding is that while there may have been Marigold ceramics, other options available, as there are today, obviously, asbestos is predominately used because it was a couple hundred bucks a ton and it was very good at the higher temperatures." When asked about the basis for this opinion, Paskal pointed to a document he found on the Internet that stated furnace workers in the steel industry in Ohio were presumptively exposed to asbestos for purposes of workers' compensation. Paskal further admitted that he lacked personal experience investigating furnaces for asbestos content and that he had no particular knowledge about the asbestos content of Pacific furnaces other than what he learned from Cashman's deposition testimony. He also said he had no information about the particular furnaces that Cashman worked on.

Next, the estate relies on Pacific employee John Navarro, who testified,[11] "From the documents that we saw at the Selas plant, . . . I did identify asbestos being called out for the packing and the gaskets of the furnaces."[12] Regarding the dates of these drawings, Navarro stated,

> In looking at the documentation where we found that some asbestos gasketing and packing was used, the dates on those drawings were the mid-'60s—mid '60's to late '60's. Some in the early '70s maybe. But I couldn't tell you the specific date. . . . Probably '71. A lot of them went back into the '50s.

[11] The estate points to the Navarro deposition for the first time in its reply brief. Ordinarily, arguments raised for the first time in a reply brief are too late to warrant consideration. Cowiche Canyon Conservancy v. Bosley, 118 Wn.2d 801, 809, 828 P.2d 549 (1992). Nonetheless, this evidence does not alter our decision.

[12] The record shows that the Selas Corporation purchased Pacific's furnace division in 1977 and moved from California to Pennsylvania in 1981.

Navarro admitted, "[W]e couldn't find some of the documents that we were looking for." Notably, he was unable to locate the specific job number of the Pacific furnaces that Cashman worked on. He also said that some of the drawings mentioned firebrick, block, and gasket without specifying asbestos. And he did not find any documents calling for asbestos in the block insulation.

While acknowledging that some gasket and packing material contained asbestos, Pacific provided evidence that nonasbestos alternatives were also used in its furnaces

as packing material and rope.[13] Under the heading "Insulating Fibers, Wools & Blankets," Pacific Sales Bulletin SB-500 states,

> Fiberfrax (Carborundum Company) and Kao-wool (Babcock & Wilcox) are both Alumina-Silica ceramic fiber materials. The fiber is made by pouring the molten material into a blast of steam. This produces a fluffy white cotton-like bulk ceramic fiber.
>
> The material can be used in bulk form and is also supplied by the manufacturers as block, blanket, rope, shapes, castable, etc.

Moreover, even assuming that Pacific used asbestos gaskets and packing material in the new furnaces and generators it shipped to PSHT and Keyport, there is no reasonable inference that Cashman was involved in removing and replacing the original door gaskets or packing material. Additionally, Cashman testified that the

[13] Cashman described the door gaskets he encountered as "two ribbons of asb—little white asbestos, like a rope, that was set in there that formed the gasket."

furnace at PSHT was already there when he began work in 1967; he did not know its model number, how old it was, or its repair history. Thus, his work with replacement gaskets or packing material is immaterial because there is no reasonable inference that he replaced the original components using new asbestos-containing gaskets or packing material manufactured or supplied by Pacific.[14] Cashman testified that he helped install a Pacific furnace with model number PKM-100 at Keyport in 1975. But that date falls outside the range of dates during which, according to Navarro, some drawings called for asbestos gaskets and packing material.[15] And like the PSHT furnace, there is no reasonable inference that he removed and replaced the original asbestos insulation.

The estate also points to certain documents obtained during discovery from the Selas Corporation.[16] One document refers to Owens-Corning Kaylo 20, an asbestos-containing block insulation with a temperature rating of 1800° F. The document states, "Kaylo-20 is well suited to high temperature uses, including refractory wall backing for furnaces . . . ." But that is a page from an Owens-Corning brochure, not a Pacific document as the estate asserts. And the estate produced no evidence that Pacific manufactured furnaces using Owens-Corning Kaylo-20.

The estate next points to the following statement in Pacific Sales Bulletin SB-

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[14] It is undisputed that Pacific did not manufacture insulation.

[15] Navarro testified that some of the furnace drawings he found calling for asbestos gaskets and packing material bore dates from the mid to late 1960s to the early 1970s, "probably, '71."

[16] Pacific argues that no foundation was provided for treating these documents as an ER 801(d)(2) admission by Pacific. But the record shows that Selas purchased Pacific's furnace division in 1977. Thus, pre-1977 documents are imputed to Pacific.

500, under the heading "Materials for Furnace Construction." "Insulating block usually consists of mineral wool fibers made from blast furnace slag, and/or asbestos fibers, held together with a high-temperature binder." But that sentence was followed by this statement:

> Most existing Pacific furnaces have been constructed utilizing A.P. Green insulating block, popularly referred to in the trade as Green Block. We may in the future be substituting other brands for cost reasons. We are currently trying Webber H.T. Block marketed by Forty-Eight Insulations, Inc.

Pacific produced evidence that A.P. Green's 1900° F insulating block, known as "Insblock-19," was suitable for heat-treating furnaces and was asbestos-free.[17] The estate presented no evidence that the two furnaces Cashman worked on contained Webber H.T. Block rather than Green Block during the relevant period. The estate asks this court to take judicial notice that Forty-Eight Insulations went bankrupt because of asbestos litigation, but this does not support a reasonable inference that Pacific's furnaces contained asbestos block insulation.

In addition, the estate submitted several "bills of material" referring to "asbestos rope" in a wiring diagram for P 1000 EN model furnaces. But Cashman did not testify, and there is no reasonable inference that he worked on a furnace with that model number. He remembered that the Pacific furnace at Keyport was model number PKM-100, but he did not remember the model numbers of the Pacific furnace or generator at

[17] The record shows that at least two layers of insulation were placed between a furnace's heating chamber and its steel walls—a layer of block insulation rated to 1900 ° F and a layer of firebrick rated to 2300° F. Pacific's expert Mark Rafferty stated, "Asbestos was typically not used in block insulation designed for service in the 1900 degree Fahrenheit range."

PSHT. And there is no reasonable inference that P 1000 EN furnaces and PK-100 furnaces were identical or used the same materials.

Finally, other documents appear to be instructions for installing certain unspecified equipment that mention asbestos wicking, gasket, or packing material. But there is no evidence or reasonable inference connecting these products to a furnace door or heating element that Cashman worked on. While some documents reference asbestos as one of several options for use as heat-resistant wire, there is no reasonable inference that Cashman was exposed to the asbestos wire (as opposed to one of the other options). And Cashman did not describe repairing wiring.

Viewing this evidence and reasonable inferences in the light most favorable to the estate, it shows a mere possibility that Cashman was exposed to asbestos in Pacific's products.[18] "A claim of liability resting only on a speculative theory will not survive summary judgment." Marshall v. Bally's Pacwest, Inc., 94 Wn. App. 372, 381, 972 P.2d 475 (1999). The trial court properly granted summary judgment.[19]

Affirmed.

WE CONCUR:

[18] It is undisputed that the estate's claims against Pacific relate to Cashman's alleged exposure to asbestos while repairing two furnaces and one generator manufactured by Pacific.

[19] Pacific also argues that the trial court erred in denying its renewed motion to dismiss the estate's lawsuit as a sanction for spoliation of evidence after Cashman's body was cremated without an autopsy. Because we conclude that the trial court properly dismissed the lawsuit on summary judgment, we need not reach this issue.